Supreme Court of the United States

OCTOBER TERM, 1960

No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1960

No.

JOACHIM RIBEIRO,

Petitioner,

against

UNITED FRUIT COMPANY, a New Jersey Corporation, and ESSO STANDARD OIL COMPANY, a Delaware Corporation,

Respondents,

and

UNITED FRUIT COMPANY, a New Jersey Corporation,

Third-Party Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above cause on November 21, 1960.

Opinions Below

The opinion of the Court of Appeals is reported at 284 Fed. 2d 317.

Jurisdiction of this Court

The judgment of the Court of Appeals was entered on November 21, 1960.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and Rule 19 of the Rules of the Supreme Court of the United States.

Questions Presented

1. In the exercise of the supervisory power of the Supreme Court, does the interest of justice require correction of obviously injurious errors and review on appeal, or does a litigant lose his right of review by appeal; of errors committed by a Trial Court, when, in fact, exceptions are taken to the errors committed but in some instances not in the precise words "I except"?

2. Is it error for a Trial Court to inform trial counsel that several questions, seven in number, will be submitted for a jury's consideration, and then, on the Court's own initiative, give to the jury but three questions, two of which are objected to, particularly where the clear and precise meaning of the word "inimical" is given a different meaning than that given by the Supreme Court over the objection of counsel?

3. Is the consent to the submission by a Trial Court to a jury of one of several questions, a waiver of objection of several other questions to which specific exception had been taken?

4. Which of the several conflicting opinions by various Circuit Courts of Appeal (set forth in further detail under Point 6 of this Petition) is correct as to construction of Rules 49 and 51 of the Federal Rules of Civil Procedure?

Reasons for Granting the Writ

1. There is conflict of opinion by various Circuit Courts of Appeal.

2. The failure to use specific verbiage in taking exceptions has been erroneously asserted as a basis for denying to a litigant the right of review by appeal, when, in fact, adequate exceptions had been taken. This constitutes a denial of justice where, obviously, an injurious error was committed by a Trial Court.

3. There is great confusion and conflict of opinion by various Circuit Courts of Appeal as to the meaning and manner in which Rule 49 and Rule 51 of the Federal Rules of Civil Procedure are to be applied in our Federal Courts.

4. The Trial Court committed error by a radical departure from the correct interpretation of the word "inimical" and changed and limited the meaning of said word as expressed by the Supreme Court of the United States, and gave it a meaning far different and in conflict with the meaning given by said Supreme Court. The Court below refused to pass upon this question although urged as error.

5. The Trial Court erroneously usurped the function of the jury in total disregard of well established law, Rules of Procedure and admission of evidence over strenuous objection.

Facts

The plaintiff was a night watchman on the S.S. PARISMANIA; defendant's barge No. 23 was tied alongside this vessel to bunker it. Its crew consisted of two men designated by Esso as "Captain" and "Mate". The bargemen, in order to prepare for the fueling operation, placed a ladder on the deck of the barge leading to the deck of the ship. The bargemen prepared the vessel for the pumping of the fuel and returned to the ship.

Plaintiff had no duties on board the barge.

Plaintiff climbed down from the ship to the barge. He testified he was injured while returning to his ship because of the defective and unseaworthy condition of the ladder.

Afte a long trial lasting from November 23 through December 4, 1959, the Trial Court advised counsel on both sides that he would submit a special verdict of seven questions.

Later and after argument by counsel, the Trial Court decided to submit the verdict in "two sections", the 1st. question of "liability" and secondly, the issue of "damages".

The charge states:

> "There are seven questions, which I will discuss with you. I shall first discuss three of these questions and ask you to return a special verdict of yes or no to each one of them. Depending upon your answers to these questions, I shall submit further questions for your determination" (Charge 8a).

The three questions and the answer of the jury are as follows:

> "Question 1. Did the captain of the Esso barge 23 invite the plaintiff on the barge?
> Answer. No:
> Question 2. Did the Captain have authority to invite the plaintiff aboard the barge for a purpose other than in furtherance of the owners?
> Answer. No.
> Question 3. Was the plaintiff aboard the barge for a purpose inimical to the legitimate interest of her owner?
> Answer: Yes."

The only issue that counsel for plaintiff was willing to have the jury answer was whether the presence of the plaintiff on the barge was for a purpose not inimical to the legitimate interests of the owner as construed by this Court in *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 623, 79 S. Ct. 406.

The objections of plaintiff to the three question verdict are found in the footnotes of the opinion of the Court below as follows:

> "After the trial judge announced his intention of submitting the question of liability first, and then

submitting the issue of damages only if liability was established, the following colloquy took place:

'Gentlemen, do you understand what the questions are that we are going to put to them?

Mr. Rassner: I do, your Honor.

The Court: It won't be necessarily in that language, but that is going to be the substance of it.

Mr. Rassner: May I make a comment as to that, your Honor.

The Court: Yes, sir.

Mr. Rassner: In the main I feel that your Honor's thoughts should facilitate matters. However, as a matter of protecting my client's rights I would like to express one objection. I feel that the question of whether or not the plaintiff was aboard that vessel lawfully, rightfully is a matter of law and not a matter of fact, and therefore I object to so much—I consent to everything else but object to so much—

* * * *

Mr. Rassner: I object to the submission of whether or not the plaintiff was lawfully or properly aboard the vessel to the jury on two grounds: first, that I believe it was error for the Court to permit any evidence as to the rules and regulations of the company as not binding on the plaintiff and in no wise lessening the authority of the master to invite or permit the plaintiff aboard the vessel, and I use the words 'invite or permit' advisedly; secondly, that whether or not the plaintiff was there with the original express invitation of the master or with his consent is immaterial so long as he was there for purposes not inimical to the interests of the owners of the barge 23.

With that one reservation—

Mr. Rassner: For the record, I would like to make my position clear.

The Court: I don't know what it means, "for the record." In other words, you don't mean it seriously?

Mr. Rassner: No. I object to a question being submitted to the jury which in any wise gives them the duty or right to pass upon whether or not the plaintiff was aboard the vessel rightfully or wrongfully other than in a manner inimical to the interests of the barge 23.'

> "Plaintiff objected to the submission of the first question on the ground that it was immaterial whether he was an invitee or a licensee or even a trespasser. The only test was whether he was on board for purposes 'inimical to the ship's interest.' He objected to the submission of the second question on the ground that even if the issue of invitation was relevant, it would be the apparent authority of the captain to invite him and not the actual intercompany limitations on the captain's authority that would control."

After the charge counsel for plaintiff again excepted to the submission of questions 1 and 2 on the ground that neither question is a proper question in the case at bar. "They are irrelevant, immaterial and outside the issues of this case" (App. 18a).

As to question 3 counsel for plaintiff stated:

> "Plaintiff takes exception to so much of the Court's charge as makes comment,—this has particular reference to question No. 3—on the conversation had by the plaintiff and the captain of the barge before the plaintiff entered the galley on the barge, *particularly in view of the fact that the conversation relating to the plaintiff's home life and business has been omitted;* furthermore, *that any conversation that took place before there was this absolute change of status, if it did not exist in the first instance, of an invitee to the barge, the fact that the master went into a social conversation and did offer refreshments, be it with milk or coffee, in his quarters changed the status, if there was a change necessary, of the plaintiff from whatever status it might have been to that of an invited guest.*" (App. 19a) (italics ours)

Later the following colloquy took place between counsel for plaintiff and the Court:

> "Mr. Rassner: I have made my objections on the record. Now I have one more; that there be a direc-

tion as to the third question and a direction that the plaintiff was aboard barge 23 for purposes not inimical to the interests of the barge owner as there is no dispute that he was there for purposes not inimical to the interests of the vessel." (App. 22a)

"Plaintiff takes exception to the Court's refusal to charge the jury to find that the plaintiff was on board the vessel for purposes not inimical to the interests of the owner." (App. 23a)

After the jury had been deliberating for some time the jury sent this formal communication to the Court:

"In question 3, please clarify the use of the word 'inimical' and the phrase 'for purpose'."

Upon its receipt the Trial Court discussed the note with counsel, stating:

"If you look in the dictionary I suppose in the ordinary sense 'inimical' might be 'hostile.' That means that unles you find that a person boarded a vessel unauthorizedly with a view to blowing up the vessel he was not on there for a purpose inimical. I suppose 'inimical' as used there might be almost defined as inconsistent with the legitimate interests of the owner, and I should like to hear your definition, Mr. Rassner, the definition you would like me to give to the jury.

Mr. Rassner: May I respectfully ask the court to charge the jury only by answering the question directly without elaboration. They ask: what is the meaning of it. The meaning is hostile or harmful and nothing more." (App. 28a)

The Court charged the jury:

"If is very significant that your request is not for dictionary definitions of those words, but to clarify the use of those words. You know, a word used in one context may have one meaning and that same word used in a different context may have an entirely different meaning. As used in the con-

text of the charge the term 'inimical' was intended to mean 'inconsistent with' and the phrase 'for purpose speaks for itself.'

Thank you, gentlemen.

Mr. Rassner: May I have my objection noted.

The Court: The objection has been noted." (App. 28a *et seq.*)

Argument

The Court below and the Trial Court have made so many fundamental and obvious errors in passing upon the issues of fact and in determining the applicable rules of law that the judgment herein must be reversed.

Even though the actual submission of the three question special verdict was and is contrary to all proper procedure, plaintiff was entitled to a fair and impartial determination of his exact status on the barge immediately before the accident and of his legal rights created by such status.

The factual issues at the trial were:

1. Whether the plaintiff had been invited on the barge by the captain?

2. Whether there was a change in his legal status on the charge because of the undisputed evidence as to what occurred after plaintiff went on the barge. Plainitff testified that he was invited on the barge by the captain (Charge 11a) and that later he was in the galley with the captain drinking from a container of milk (Charge 11a).

   The captain admitted that he gave plaintiff a glass of milk; that he talked to him, while he was on the barge and while he was drinking the milk so given him by the captain, about living in Hastings and about his having two jobs at the time of the accident (App. 4a).

3. Whether the presence of the plaintiff on the barge was for a purpose inimical to the legitimate interest of the barge?

This statement as to the ultimate issues is not questioned by the Court below nor by the Trial Court.

Let the record speak for itself:

1. At the conclusion of the trial the Court told counsel that he would submit his proposed seven question special verdict which is proper and acceptable practice.

2. After argument of counsel to the jury and without any notice from the Court that he did not intend to submit the seven questions, the Court of its own volition decided upon the three question verdict.

3. At that time counsel for plaintiff specifically objected to the submission of questions 1 and 2 and at that time counsel told the Court in no uncertain terms that the rules and regulations of the company were immaterial; that any such rules and regulations in nowise lessened the authority of the master to invite or permit the plaintiff aboard the vessel and that the only issue was whether plaintiff was there for purposes not inimical to the interests of the barge 23 (this brief, pp. 6, 7).

4. The Court below based its entire decision on that part of the charge which is quoted in its opinion:

> "If you find that plaintiff went there for the purpose of helping himself to some food, whether it be milk or coffee or whatever it was, and that he did so without the captain's consent you may find that he went there with a purpose inimical to the interest of the captain. In view of the relationship between the captain of the barge and its owner you may conclude from this testimony that the plaintiff had a purpose inimical to the legitimate interests of the owner of the barge."

In reading this charge it *must be noted* that the charge refers solely to the initial entry of plaintiff on the barge.

Counsel for plaintiff had already made his objections to that part of the charge which states:

> "In view of the relationship between the captain of the barge and its owner you may conclude from this testimony that the plaintiff had a purpose inimical to the legitimate interests of the owner of the barge."

He had already told the Court at the time question "3" was to be submitted that the relationship between the captain of the barge and its owner and the authority of the captain were wholly immaterial and had no bearing whatsoever as to whether the plaintiff's visit was "inimical" (see "3" immediately above).

5. At the conclusion of the Court's charge counsel again stated his view of the rights of the plaintiff on board the barge when he specifically excepted to the charge as set forth herein at page .

6. During its deliberations the jury became confused as to the meaning of the term "inimical" and sent a note signed by the foreman requesting clarification as to its meaning.

At that time the Court asked counsel for plaintiff for his opinion.

Counsel told the Court:

> "They ask: what is the meaning of it. The meaning is hostile or harmful and nothing more." (App. 28a)

At that time the Court erroneously told the jury:

> "As used in the context of the charge the term 'inimical' was intended to mean 'inconsistent with'." (App. 29a)

To which charge plaintiff took objection which was noted by the Court (App. 29a).

The conclusion of the Court below that counsel for the plaintiff did not take proper exception to the charge as originally given is contrary to the record itself.

The conclusion of the Court below that counsel for plaintiff is precluded from taking any exception to the erroneous charge after the jury's request for clarification of the term 'inimical' is wholly erroneous and contrary to the decisions of this and other Courts.

The Court below avoided and evaded the determination of the plaintiff's legal status by its failure to properly examine the record and by its refusal to properly apply the law.

The specific errors of the Court below and the Trial Court will be discussed seriatim in the various points of this brief.

POINT I

This Court in the exercise of its supervisory power must reverse the decision of the Court below in the interests of justice because the rulings of such Court and of the trial Court are so obviously and injuriously erroneous.

The trial was replete with error.

From the beginning of the trial until the rendering of the final verdict after the clarification of the term "inimical" counsel for plaintiff had based his claim for recovery herein as to the legal status of the plaintiff on the barge on two alternate factual situations, namely:

1. That plaintiff had been invited on the barge by its captain in the first instance, or

2. that even though the initial entry had been unjustifiable there had been a legal "change of

> status'' resulting from what had transpired on the barge after the original entry which gave the plaintiff the same legal rights as an invited guest from the time he left the ship.

Counsel urged at all times that it was immaterial which alternative the jury adopted.

It was always his contention throughout the trial as shown by the record that a recovery could be had on either or both theories.

The Court told counsel that it was his opinion that the plaintiff

> ''stealthily got aboard this barge with a view to committing larceny and apparently he succeeded in part because he was not discovered until the captain of the barge went in there after he had completed some of his chores on the deck.'' (App. 22a)*

While the Court stated that he ''did not expound it to the jury'' the record in of itself demonstrates a concerted never diminishing attempt of the Trial Court to enforce such opinion by indirection what it could not do directly because it would be manifest error and a gross usurpation of the powers of a jury.

The attitude of the Trial Court seems to have been that as long as he could not express to the jury his own personal version of the case as outlined to counsel as above, at least he could, would and did prevent the plaintiff from presenting his claim as to his status on the barge in a fair and impartial manner.

Let the record speak for itself.

After this Court reviews the record and the law applicable thereto it is submitted that this is a case where

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* This and later references are to petitioner's appendix printed for the Circuit Court of Appeals.

this Court, in exercise of its supervisory power, must reverse the judgment of the Court below because the rulings are so obviously and injuriously erroneous.

Gibson v. *Lockheed Aircraft Service*, 350 U. S. 356, 76 S. Ct. 366.

The Court below refused to pass upon one vital ultimate issue, namely, the legal status of the plaintiff on the barge because, in its opinion, counsel for plaintiff failed to take the necessary exceptions to protect the interests of his client.

The record shows that such exceptions were taken but whether he did or not becomes and is immaterial when, as here, the errors are fundamental and obvious.

In *United States* v. *Atkinson*, 297 U. S. 157, 160, this Court said:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings."

In *Dowell Inc.* v. *Jowers*, 5 C. C. A. 166 Fed. 2d 214:

> "We think that in the interest of justice the court here must act upon its own motion. So acting, we hold that the trial judge's charge to the jury constitutes reversible error."

In *McNello* v. *John B. Kelly, Inc.*, 3 C. C. A. 283 Fed. 2d 96, 102:

> "The question of liability in the present case was submitted to the jury with what was tantamount to no instructions at all. Few more fundamental errors with respect to a charge can be conceived. A holding that counsel's failure to take exception to such a procedure bound his client, would, in our opinion, result, in a gross miscarriage of justice."

To same effect:

Callwood v. *Callwood*, 3 C. C. A. 233 Fed. 2d 784, 788;

Montgomery v. *Virginia Stage Lines, Inc.*, 191 Fed. 2d 770, 774, U. S. Appeals D. C.;

Shokuwan Shimabukuro v. *Higeyoshi-Nagayama*, 140 Fed. 2d 13, U. S. Appeals, D. C.;

Hormel v. *Helvering*, 312 U. S. 552, 556.

The late Circuit Judge Frank of the Second Circuit Court of Appeals in reviewing *United States* v. *Atkinson*, *supra*, said in his concurring opinion in *Troupe* v. *Chicago D & G Bay Transit Co.*, 2 C. C. A. 234 Fed. 2d 253, 261:

> "There the Supreme Court set forth, in the disjunctive, two grounds for reviewing such errors:
>
> (1) the errors are obvious, or
>
> (2) they otherwise seriously affect the fairness, the integrity or public reputation of judicial proceedings."

One basic error committed at the trial was that the plaintiff and his counsel were never permitted to have the jury pass upon the most essential issue of fact, namely, whether there had been any change in his status after his original entry on the barge and before the accident.

This contention that this "change of status" created a proper cause for liability upon the part of the defendant, was made throughout the trial as the record clearly and conclusively demonstrates. It was repeatedly urged upon the Trial Court. No one questions or disputes this statement.

But nowhere is there any record in the trial where the jury was permitted to pass upon it.

It was omitted because the Trial Court refused to have it determined. The Trial Court purposely avoided all such suggestions of counsel for plaintiff.

Nowhere in the opinion of the Court below is it even discussed. Other incidental issues are discussed but not this one.

In common fairness, in common justice no trial should have been completed without this issue of liability due to "change of status" being determined by the jury.

This error is glaringly obvious. It is a basic fundamental issue. The refusal to have it passed upon of necessity injured and prejudiced the plaintiff.

There were many other serious and most prejudicial errors which are discussed later.

POINT II

The ruling of the Court below that the plaintiff failed to "object to the instruction originally given" defining "inimical" is contrary to the record and clearly erroneous.

The record shows (App. 19a):

> "Plaintiff takes exception to so much of the Court's charge as makes comment—this has particular reference to question No. 3—on the conversations had by the plaintiff and the captain of the barge before the plaintiff entered the galley on the barge, particularly in view of the fact that the conversation relating to the plaintiff's home life and business has been omitted; furthermore that any conversation that took place before there was this absolute change of status, if it did not exist in the first instance, of an invitee to the barge, the fact that the master went into a social conversation and did offer refreshments, be it with milk or coffee, in his quarters changed the status, if there was a change necessary, of the plaintiff from whatever status it might have been to that of an invited guest."

Later counsel for plaintiff requested the Court to direct the jury that the plaintiff was on the barge for purposes not inimical to the interests of the vessel (App. 22a and 23a).

This exception of counsel recognizes the rule of law that there can be a change of status after an original entry.

In *Bernal* v. *Baptist Fresh Air Home Society*, 275 A. D. 88, later affirmed by the Court of Appeals, 300 N. Y. 486:

> "Plaintiff's status in the camp generally was similar to that of a social guest of the defendant and as such she was a licensee. * * * However, on this record at the time of the accident herein-plaintiff was in the pantry drying dishes as part of camp routine for girls of her age, and she was at that time and place an invitee, or so a jury could find; and in such case defendant would have the common law duty to use the reasonable care due an invitee."

Restatement of Torts, Section 342, also recognizes this distinction wherein it states:

> "invites or permits them to enter or *remain* upon the land." (Italics ours.)

To same effect:

> *Ferro* v. *Sinsheimer Estate Inc.*, 256 N. Y. 398;
> *Giglio* v. *Rubin*, 278 A. D. 200 (N. Y.);
> *Supornick* v. *Supornick*, 222 N. W. 275 (Minn.);
> *Halvorson* v. *562 W. 149th St. Corp.*, 290 N. Y. 40;
> *Henry W. Cross Co.* v. *Burns*, 81 Fed. 2d 856, 8 C. C. A..

This Court in many instances has held that the status of a plaintiff is to be determined on the basis of all the relevant factors.

> *Ward* v. *Atlantic Coast Line R. Co.*, 80 S. Ct. 789;
> *Baker* v. *Texas & Pacific Ry. Co.*, 359 U. S. 227, 79 S. Ct. 664;

Butler v. *Whiteman*, 356 U. S. 271, 78 S. Ct. 734;
Senko v. *La Crosse Dredging Corp.*, 352 U. S. 370, 77 S. Ct. 415;
Grimes v. *Raymond Concrete Pile Co.*, 356 U. S. 252, 78 S. Ct. 687;
Petty v. *Tennessee-Missouri Bridge Comm.*, 359 U. S. 275, 79 S. Ct. 785.

See also:

United States v. *Mississippi Valley Generating Co.*, decided January 9, 1961.

The objection is sufficient if the Trial Court is told of the basis of counsel's claim.

Rule 46, Federal Rules of Civil Procedure;

Rule 51, Federal Rules of Civil Procedure.

In Moore's Federal Procedure, discussing Rule 51 in Section 51.04 at page 2505:

> "The rule does not require formality; and it is not important in what form an objection is made, or even that a formal objection is made at all, as long as the trial judge understands the party's position."

To same effect:

Sweeney v. *United Feature Syndicate*, 129 Fed. 2d 904, 2 C. C. A.;
Broderick v. *Harvey*, 252 Fed. 2d 274, 1 C. C. A.;
Greyhound Corporation v. *Blakley*, 262 Fed. 2d 401, 9 C. C. A.;
Pierro v. *Carnegie-Illinois Steel Corp.*, 186 Fed. 2d 75, 3 C. C. A.;
Green v. *Reading Company*, 183 Fed. 2d 716, 3 C. C. A.;
American Alliance Insurance Co. v. *Keleket X-ray Corp.*, 248 Fed. 2d 920, 6 C. C. A.;
Elgin Corp. v. *Atlas Bldg. Products Inc.*, 251 Fed. 2d 10 C. C. A. cert. denied 78 S. Ct. 1371.

7

In *American Alliance Ins. Co. v. Keleket X-ray Corp.*, 248 F. 2d 920, 6 C. C. A., the Court stated at page 924:

> "* * * Appellee takes the position that this court may not consider this issue, as appellants did not take exception to the charge when delivered by the court. We recognize that the most important purpose of Rule 51, Federal Rules of Civil Procedure, 28 U. S. C. A. is to prevent litigants from challenging on appeal the correctness of the court's charge to the jury where no objections were raised before the trial judge, thus failing to afford him opportunity to correct inherent errors. We think, however, that in the instant case the objections raised by appellants in the discussion of the charge with the district judge properly preserved the right to assign alleged errors in the court's instructions."

One objection is sufficient.

Troupe v. *Chicago D & G Bay Transit Co.*, 2 C. C. A. 234 Fed. 2d 253;

Moreau v. *Pennsylvania R. R. Co.*, 166 Fed. 2d 543, 3 C. C. A.;

Union Pac. Ry. Co. v. *Owens*, 142 Fed. 2d 145, 9 C. C. A.;

U. S. v. *Rayno*, 136 Fed. 2d 376, 1 C. C. A., cert. denied 320 U. S. 776.

Counsel for plaintiff made proper and sufficient objections to the charge of the Court as shown by the record herein quoted from (App. 19a).

This exception in and of itself was adequate.

However, counsel for plaintiff advised the Trial Court at the time the three question verdict was being forced upon him of his conception of the law involved in the case.

This too was sufficient objection under Rule 51 of the Federal Rules of Civil Procedure.

The conclusion of the Court below that counsel for plaintiff failed to object to the instruction originally given is contrary to the record and is wholly erroneous.

For this reason and this reason alone the judgment must be reversed.

The record discloses that counsel for plaintiff at various times during the trial made known to the Court his contention as to the change of status of plaintiff.

These statements are sufficient compliance with Rule 51 as long as they were given "before the jury retires to consider its verdict". Rule 51, F. R. C. P.

The cases cited sustain this contention.

These and other objections require the reversal of the judgment herein.

POINT III

Assuming *arguendo*, that the plaintiff failed to take proper exception in the first instance, the exception taken to the charge when the jury came in for clarification of the original charge is sufficient compliance with Rule 51.

The Court below conceded that counsel for plaintiff took proper exception when the jury after some deliberations sent in its written request for clarification of the word "inimical".

The record shows that at that time the Trial Court asked Mr. Rassner for his definition of the word "inimical" and that at that time Mr. Rassner stated:

> "May I respectfully ask the Court to charge the jury only by answering the question directly without elaboration. They ask: what is the meaning of it. The meaning is hostile or harmful and nothing more." (App. 28a)

The Court charged the jury:

> "* * * As used in the context of the charge the term 'inimical' was intended to mean 'inconsistent with'.

Mr. Rassner: May I have my objection noted.
The Court: The objection is noted." (App. 28a *et seq.*)

The Court below in its opinion states:

> "We think that the failure of the plaintiff to object to the instruction originally given and which the jury was still permitted to accept as correct even after the charge defining inimical as 'inconsistent with', prevents the recharge from being error if in fact the court defined inimical too favorably for defendant which we do not decide."

This ruling of the Court below constitutes fatal error.

Counsel for plaintiff took proper exception in the first instance but whether he did or not becomes immaterial when, as here, the jury came in asking for instructions because apparently it had forgotten and did not remember the charge of the Court.

The situation at that time was the same as if the jury had never been instructed as to the meaning of the term.

The Court asked counsel for plaintiff for his definition and counsel for plaintiff replied giving his meaning of "inimical".

But regardless of what transpired the Court gave an improper and erroneous instruction to which counsel then took sufficient and proper exception.

The ruling of the Court below that counsel for plaintiff could not take advantage of his exception when the jury asked for clarification is wholly erroneous.

Fillippon v. *Albion Vein Slate Company*, 250 U. S. 76, 81;

Arrington v. *Robertson*, 114 Fed. 2d 821, 822, 3 C. C. A.;

Snyder v. *Lehigh Valley Ry. Co.*, 245 Fed. 2d 112, 3 C. C. A.;

Louisville & N. R. R. Co. v. *Johnson*, 81 Fed. 679, 7 C. C. A.;
Hansen v. *St. Joseph Fuel Oil & Mfg. Co.*, 181 Fed. 2d 880, 8 C. C. A.;
Baer Bros. Land & Cattle Co. v. *Palmer*, 158 Fed. 2d 278, 10 C. C. A.;
Atlantic Coast Line R. R. Co. v. *Dixon*, 189 Fed. 2d 525, 5 C. C. A.;
Palmer v. *Miller*, 145 Fed. 2d 926, 930, 8 C. C. A.;
Fitzpatrick v. *Sooner Oil Company*, 212 Fed. 2d 548, 10 C. C. A.;
Theriot v. *Mercer*, 262 Fed. 2d 754, 5 C. C. A., cert. denied 79 S. Ct. 941;
Seaboard Air Lines R. Co. v. *Bailey*, 190 Fed. 2d 812, 5 C. C. A.;
Chicago B. & Q. Ry. Co. v. *Kelley*, 74 Fed. 2d 80, 84, 8 C. C. A.;
Smulczeski v. *City Center of Music*, 3 N. Y. 2nd 498;
Greenwood v. *Inter Ocean Insurance Co.*, 89 S. E. 2d 455, 461.

In *Fillippon* v. *Albion Vein Slate Co.*; 250 U. S. 76, page 81, 39 S. Ct. 435, 436, 63 L. Ed. 853, the Supreme Court said:

"We entertain no doubt that the orderly conduct of a trial by jury, essential to the proper protection of the right to be heard, entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings from the time the jury is impaneled until it is discharged after rendering the verdict. Where a jury has retired to consider of their verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object. Under ordi-

nary circumstances, and wherever practicable, the jury ought to be recalled to the courtroom, where counsel are entitled to anticipate, and bound to presume, in the absence of notice to the contrary, that all proceedings in the trial will be had. In this case the trial court erred in giving a supplementary instruction to the jury in the absence of the parties and without affording them an opportunity either to be present or to make timely objection to the instruction." (*Arrington* v. *Robertson*, 114 F. 2d 821, at pp. 822, 823.)

In *Arrington* v. *Robertson, supra*, at page 823:

"The action of the trial judge in the present case in sending instructions to the jury from his chambers in the absence of the defendant or his counsel and without giving them notice and an opportunity to be present amounted to a denial of due process of law. We hold that it was the denial of a right so fundamental as necessarily to affect the substantial rights of the defendant regardless of the nature or propriety of the instruction given. The inquiry of the jury and the trial judge's response were not reported by the court stenographer. The record does not disclose the phraseology of the jury's question. Consequently we cannot know whether the instructions given, even though entirely sound as abstract legal statements, were appropriate to answer it, or whether additional instructions, appropriate and indeed necessary to supplement those given, might not have been suggested to the trial judge by counsel for the defendant if he had been given the opportunity to be present."

In *Palmer* v. *Miller, supra*, at page 930:

"• • • Where, after the submission of a case to a jury, the jury is given additional instructions or the court has the instructions which were given read to the jury, the case, in a practical sense, is not finally submitted to the jury until that time. If it then appears that an instruction which is then given or repeated is erroneous and should be corrected, we have no doubt that a party has the right to object

to the instruction at that time and that it is the court's duty to correct it."

In *Fitzpatrick* v. *Sooner Oil Co., supra*, at page 551:

> "When a jury returns to the courtroom with the request for further instruction, the presumption must be that the only uncertainty in the jury's mind is with respect to the matter about which further instruction is sought and the court is required only to fairly answer the question asked by the jury."

In *Smulczeski* v. *City Center of Music Inc., supra*, the Court said:

> "To obviate an erroneous instruction upon a material point, it must be withdrawn in such explicit terms as to preclude the inference that the jury might have been influenced by it."

In *Louisville & N. Ry. Co.* v. *Johnson, supra:*

> "When it is proposed by a further instruction to *correct an erroneous* charge, the purpose should be stated, and the explanation made so clear as to leave no room for reasonable mistake." (Italics ours.)

Here the Trial Court had an opportunity to withdraw or correct its prior erroneous instruction to preclude any inference that the jury might have been influenced by it.

In *Theriot* v. *Mercer, supra*, the Court held that it was prejudicial error when the Trial Court had not made the attempt to correct the erroneous charge until the jury had been out for more than 30 minutes.

The presumption follows as matter of law that an erroneous charge is prejudicial.

Fillippon v. *Albion Vein Slate Company, supra;*
Blodgett v. *Pinkerton Tobacco Co.*, 79 Fed. 2d 945; 6 C. C. A.;
Baltimore & Ohio Ry. Co. v. *U. S.*, 242 Fed. 1, 6 C. C. A.

The decision of the Court below that petitioner cannot avail himself of the error of the Trial Court in giving the erroneous definition of "inimical" when the jury came in for the express purpose of having the word clarified is fatal error for which the judgment must be reversed.

POINT IV

The ruling of the Court below approving the submission of the three question verdict was contrary to Rule 49 of the Federal Rules of Civil Procedure; such three questions in and of themselves were prejudicial to the rights of the plaintiff.

Upon conclusion of the testimony the Trial Court advised counsel that it would submit the issues to the jury by a seven question special verdict, a procedure permitted by Rule 49 of the Federal Rules of Civil Procedure which specifically requires

"a special written finding upon each issue of fact."

AFTER ARGUMENT and without notice to either counsel and contrary to all federal rules and procedure and now expressly prohibited by *Miner* v. *Atlass*, 80 S. Ct. 1300, the Trial Court permitted counsel to argue the expected seven question special verdict to the jury and then arbitrarily and without one word of warning prepared and submitted the three questions for its ultimate decision.

Counsel for plaintiff was trapped.

The trial had gone on from November 23rd through December 4th. Counsel, rather than force a mistrial, determined that he would and did consent to the submission of one issue and one issue only, namely, whether plaintiff was on the barge "for purposes not inimical to the owners of the barge".

The Court below states that counsel could have asked for the submission of additional facts to the jury.

Rule 49 specifically calls for the submission of all issues. The Trial Court had determined what those issues were to be when he prepared the seven questions but when he decided upon the three, there was nothing further for plaintiff to do except to make the objections that were made before the questions were submitted.

He objected to all the questions as prepared by the Judge but did consent to the one question, namely, whether plaintiff came within the ruling of this Court in the *Kermaree* case, *supra*.

As stated plaintiff was trapped and could take no other nor different course.

Rule 49 and the applicable decisions of this Court determine that there can be no piecemeal litigation.

Miner v. *Atlass*, *supra*, determines that not even the District Courts as such can amend federal rules of procedure.

In *Magenau* v. *Aetna Freight Lines Inc.*, 360 U. S. 273, 79 S. Ct. 1184:

> "We are therefore of the opinion that a new trial on the whole case is necessary, since these disputed issues are so interrelated with the ultimate issues of liability and damages that a limited hearing would not be in the interest of fairness and efficiency in judicial administration."

In *Ward* v. *Atlantic Coast Line Ry. Co.*, 80 S. Ct. 789, 792:

> "The parties' characterization is but one factor to be considered among others, see Restatement, Agency 2d, Sec. 220(2)(i) and the issue is one for determination by the jury on the basis of all the relevant factors."

In *Baker* v. *Texas & Pacific Ry. Co.*, 359 U. S. 227, 79 S. Ct. 664, 665:

> "Although we find no decision of this Court that has discussed the matter, we think it perfectly plain that the question, like that of fault or of causation under the Act, contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors under law."

In *Hodges* v. *Easton*, 106 U. S. 408, 412-413:

> "Whether this contention be sound or not, we need not now determine, for the reason that the grounds upon which it rests have no existence, where, as here, the case, as to the issues triable by jury, was not submitted to the jury in the mode required by law."

Plaintiff is entitled to a proper submission of all issues to the jury.

Magenau v. *Aetna Freight Lines Inc., supra;*
Schulz v. *Pennsylvania R. R. Co.*, 350 U. S. 523, 76 S. Ct. 608;
Galloway v. *United States*, 319 U. S. 372, 63 S. Ct. 1077;
Byrd v. *Blue Ridge Rural Electric Co-operative*, 356 U. S. 525, 78 S. Ct. 893;
Ward v. *Atlantic Coast Line R. R. Co., supra;*
Baker v. *Texas & Pacific Ry. Co., supra.*

In *Kennedy* v. *Pennsylvania Railroad Company*, 282 Fed. 2d 705, 710, 3 C. C. A.:

> "However, in the light of the foregoing the jury findings were not fully determinative of the question of indemnity. Therefore the judgment in favor of the Pennsylvania Railroad Company will be reversed and that cause remanded for a new trial."

In *Blue Ridge Rural Electric Co-operative Inc.* v. *Byrd*, 264 Fed. 2d 689, 693, 4 C. C. A.:

> "These questions are not susceptible of definite answer in the present state of the record, and hence we cannot say conclusively that there was no evidence of negligence on the part of the defendant's lineman."

In *Louisville & N. R. Co.* v. *Johnson*, 81 Fed. Rep. 679, at page 681, 7 C. C. A., the Court stated:

> "* * * It was, therefore, the more important that an accurate definition and explanation of the company's duty should have been given to the jury. The error was not corrected by other portions of the charge, which, though implying the true rule, were not sufficient to prevent misunderstanding on the part of the jury. * * *"

Plaintiff was entitled to a fair trial in a fair tribunal where every effort should be made to prevent even the possibility of unfairness.

In re Murchison, 349 U. S. 133, 136;
Offutt v. *United States*, 348 U. S. 11;
Tumey v. *State of Ohio*, 273 U. S. 510, 532.

The three questions speak for themselves.

They were submitted for the purpose of confusing and entrapping the jury and by reason thereof were highly prejudicial and constituted error.

Blankenship v. *Ellerman's Wilson Line New York Inc.*, 4 C. C. A., 265 Fed. 2d 455;
Atchison Topeka and S. F. Ry. Co. v. *Hale*, 69 Pac. 612 (Kan.);
B. F. McLean Investment Company v. *City of Wichita*, 268 Pac. 2d 956 (Kans.);
Vukich v. *City of Detroit*, 28 N. W. 2d 894 (Mich.);
Greenwood v. *Inter Ocean Insurance Co.*, 89 S. E. 2d 455;
Reliance Engineers Co. v. *Flaherty*, 300 N. W. 603 (Minn.);

John M. Parker & Son v. *Godsey*, 115 S. W. 2d 276 (Ark.);

Pritchett v. *Highway Insurance Underwriters*, 304 S. W. 2d 585 (Tex.);

Neumann v. *Evans*, 272 Wis. 579;

Johnson v. *Firemans Fund Indemnity Co.*, 264 Wis. 358.

In *Atchison Topeka and S. F. Ry. Co.* v. *Hale*, *supra*:

> "A court should never submit special questions that are intended to or are liable to confuse or entrap it into making mistakes."

In *Blankenship* v. *Ellerman's Wilson Line New York, Inc.*, 265 Fed. 2d 455, 4 C. C. A., the Court submitted a special verdict of four questions:

> 1. Did any unseaworthiness of the ship contribute to the accident?
>
> 2. If the answer to question 1 is answered "yes" was such unseaworthiness caused by any negligence on the part of the ship or any officer or employee of defendant?
>
> 3. Contributory negligence?
>
> 4. Was the accident of which the plaintiff complains the result of risks or hazards which he voluntarily assumed?

The jury brought in the answer "no" to the first question and did not answer any of the others, and upon such verdict judgment was entered in favor of defendant.

The Court of Appeals however held that the mere inclusion of the assumption of risk in the questions required a new trial.

> "The testimony on the question of seaworthiness was so conflicting that it would have supported a finding either way and the jury were told that in

> order to find in the plaintiff's favor on this matter, they must not only find unseaworthiness but also that it was the cause of the accident. At the same time the question of the assumption of risk was also submitted and the jury were told that it comes into play when a person knows that what he is doing constitutes a very definite hazard and yet voluntarily assumes it. *Keeping this instruction in mind, the jury might have concluded that the lighting in the hold was bad and yet answered the first question in the negative on the ground that the plaintiff knowingly assumed the risk and that this action on his part rather than the failure of the ship was the cause of the injury.*" (Italics ours.)

This rule of law is confirmed in *Magenau* v. *Aetna Freight Lines, Inc.*, 360 U. S. 273, 279, 79 S. Ct. 1184, 1188:

> "We are therefore of the opinion that a new trial on the whole case is necessary, since these disputed issues are so interrelated with the ultimate issues of liability and damages that a limited hearing would not be in the interest of fairness and efficiency in judicial administration."

The questions in and of themselves constituted a premeditated act on the part of the Trial Court to inform and advise the jury as to the legal effect of their answers to the questions, a course of conduct that is prohibited and condemned by established rules of law.

> *Thelorf* v. *Lipsey*, 237 Fed. 2d 190, 7 C. C. A.;
> *Cate* v. *Good Brothers*, 181 Fed. 2d 146, 3 C. C. A.;
> *Carpenter* v. *Baltimore & Ohio Ry. Co.*, 109 Fed. 2d 375, 6 C. C. A.

The questions evidence the opinion of the Trial Court that the plaintiff "stealthily got aboard the barge with a view to committing larceny" and apparently he had succeeded in part because he was not discovered until the captain went in there after he had completed some of his chores on the deck" (App. 22a).

These three questions in and of themselves presented such a prejudicial outline of this case that the judgment must be reversed.

First Question

The suggestion by counsel for plaintiff that only one question of fact be submitted, namely, whether the visit of the plaintiff on the barge was inimical to the legitimate interests of the barge, is the only submission that could have been made which would have prejudiced no one.

If plaintiff's presence was not inimical, such presence could have been justified by a finding by the jury either

(1) that plaintiff had been expressly invited on the barge by the captain, or

(2) that there had been the legal change of status contended for by plaintiff by the applicable decisions herein referred to.

Either finding would have been sufficient to justify a verdict in his favor as to status.

It was not necessary for plaintiff to prove an "express" invitation in the first instance.

But this is what the Trial Court erroneously insisted upon throughout the trial.

The legal distinction as to any "change of status" could not have been decided by the jury by any answer to any question.

Such distinction could not then and cannot now be determined because any inquiry would be in the alternative, a rule of procedure prohibited by this Court in *United New York and New Jersey Sandy Hook Pilots' Ass'n* v. *Halecki*, 358 U. S. 613, 79 S. Ct. 517, where it is stated:

> "It follows from what has been said that a new trial will be required, for there is no way to know

> that the invalid claim of unseaworthiness was not the sole basis for the verdict."

By his own testimony the captain eliminated the legal effect of the answer of the jury to the first question.

The social visit that the captain recognized and admitted, nullified any possible improper entry.

The first question in and of itself presents an unfair prejudicial inquiry that might and could reasonably cause the jury to determine that the visit of the plaintiff on the barge was necessarily "inimical" because he was not invited on the barge.

"In the interest of fairness" (*Magenau* case, *supra*) the precise issues must be properly presented.

The fact that there was testimony in the record which would justify the conclusion of the jury that there had not been an express invitation does not and cannot defeat the claim of plaintiff that his change of status, admitted by the captain himself was sufficient to establish the right of plaintiff to recover herein under the rule of law established in the *Kermarec* case, *supra*.

This issue required a decision by the jury.

SECOND QUESTION

The question itself prejudicially presents the issue of the authority of the captain.

No shipowner can rely upon the defense that the plaintiff must prove the precise actual authority of any vessel, barge or otherwise.

His authority is proven by the very position that he holds. In *The Balsa*, 10 Fed. 2d 408, 409, 3 C. C. A.:

> "The Master is commander of the ship—lord of his little world. He is master in every sense of the word."

Apparent authority is the test, not actual authority.

Defendant is responsible for any acts of the captain which are within the apparent scope of his authority.

> *Lee* v. *Jenkins Bros.*, 268 Fed. 2d 357, 2 C. C. A.;
> *Farmer* v. *Arabian American Oil Company*, 277 Fed. 2d 46, 2 C. C. A.;
> 2 Corpus Juris, Sec. 1227;
> 2 American Jurisprudence 82.

The question itself limits the authority to the inquiry whether the captain had authority to invite the plaintiff on the barge

> "for a purpose other than one in the interests of its owners."

During the trial the Court permitted counsel for defendant to introduce proof as to the written instructions given to the captain and the regulations of the Coast Guard as bearing on the authority of the captain.

They were referred to in the charge and the jury was instructed that they could be considered by it in determining the authority of the captain (App. 13a).

Counsel objected to these instructions (App. 18a, 19a).

Counsel had already objected to the submission of questions 1 and 2 not only before argument but after the charge.

The objection to the submission of question 2 was most specific; as the Court below stated in its second footnote:

> "He objected to the submission of the second question on the ground that even if the issue of invitation was relevant, it would be the apparent authority of the Captain to invite him and not the actual inter-company limitations on the Captain's authority that would control."

This question 2 and the instructions mentioned forced upon the jury the conclusion that the captain had no authority to invite or permit the plaintiff to remain aboard the barge unless, as the question and the instructions state:

> "for a purpose other than in the interests of the owners."

This conclusion is contrary to the applicable decisions and wholly erroneous.

This Court said in *Ward v. Atlantic Coast Line R. Co.*, 80 S. Ct. 789, 792:

> "The instructions given in effect limited inquiry to the question whether the petitioner was aware that the railroad considered him not to be working for it but for some third party. But neither the railroad's communication of its concept of petitioner's status to petitioner, nor his acquiescence therein, if shown, is determinative of the issue. Cf. Cimorelli v. New York Central R. Co., 6 Cir. 148 Fed. 2d 575, 578. The parties characterization is but one factor to be considered among others, see Restatement, Agency 2d, Sec. 220(2)(i) and the issue is one for determination by the jury on the basis of all the relevant factors. Baker v. Texas & Pacific R. Co., supra."

To the same effect:

> *Baker v. Texas & Pacific R. Co., supra;*
> *Magenau v. Aetna Freight Lines Inc., supra.*

THIRD QUESTION

The third question was not an improper question and in and of itself would have determined the precise issue with reference to the "status" of the plaintiff on the barge at and immediately prior to the time of the accident.

"Inimical" was defined in the *Kermarec* case by the statement in the opinion:

> "The purpose of the visit was entirely personal: to pay a social call upon Yves and to give him a

package to be delivered to a mutual friend in France."

Webster's Dictionary defined "inimical":

> "1) Having the disposition or temper of an enemy; unfriendly; unfavorable, chiefly applied to PRIVATE, as HOSTILE is to PUBLIC, enmity."

When the jury requested clarification of the word, counsel for plaintiff stated:

> "They ask: what is the meaning of it. The meaning is hostile or harmful and nothing more." (App. 28a)

Plaintiff was entitled to that definition in the charge.

The Trial Court defined it as meaning "inconsistent with".

Its meaning the Court below refused to determine because it said it was unnecessary.

The three question verdict was prejudicial in form. It confused and entrapped the jury and prevented it from determining the ultimate status of the plaintiff.

The first question limited the inquiry solely to the initial invitation.

This precluded any inquiry as to the conceded "change of status" as a result of what transpired during the social visit of plaintiff and the captain at which time the captain admitted he gave milk to the plaintiff.

The second question eliminated any possible issue of "apparent authority" which was a real issue in the case. It further limited whatever authority the captain had by prohibiting him from doing anything that did not further the interests of the owner of the barge.

The third question forced the jury to answer it "yes" because the captain could not invite the plaintiff to come on the barge, could not permit him to remain on the barge

within the meaning of the *Kermarec* case for the alleged reason that the captain had no authority whatsoever because of the instructions given him by the owner and by the regulations of the Coast Guard unless the visit of the plaintiff was to further the legitimate interests of the owners of the barge.

The conclusion of the Court below that the three questions were not prejudicial to the rights of the plaintiff is contrary to the law and must be reversed.

The necessity of submitting a special verdict free from confusion and entrapment is analogous to the decisions requiring proper, concise instructions to a jury upon the precise issues.

United New York and New Jersey etc. v. *Halecki*, 358 U. S. 613, 79 S. Ct. 613;
Halecki v. *United New York and New Jersey etc.*, 282 Fed. 2d 137, 2 C. C. A.;
Magenau v. *Aetna Freight Lines*, 360 U. S. 273;
Ward v. *Atlantic Coast Line R. Co.*, 80 S. Ct. 789;
Conn v. *Young*, 267 Fed. 2d 725, 2 C. C. A.;
Smith v. *Texas Company*, 219 Fed. 2d 74, 2 C. C. A.;
Kendrick v. *Piper Aircraft Corp.*, 265 Fed. 2d 482, 486, 3 C. C. A.;
Texas & New Orleans R. Co. v. *Dairyland Trans. Corp.*, 266 Fed. 2d 283, 290, 5 C. C. A.;
Turner v. *Kelly*, 262 Fed. 2d 207, 4 C. C. A.;
Louisville & N. R. Co. v. *Johnson*, 81 Fed. 679, 691, 7 C. C. A.;
Johnson v. *Erie R. Co.*, 236 Fed. 2d 352, 2 C. C. A.;
Molnar v. *Slattery Contracting Co. Inc.*, 8 A. D. 2d 95 (N. Y.);
Herbst v. *Balogh*, 7 A. D. 2d 530 (N. Y.).

In *Kendrick* v. *Piper Aircraft Corp.*, *supra*:

"But error there is and it cannot be held called harmless error if the members of the jury, perhaps

by legal fiction, listen to everything the judge tells them, understand it, remember it, and then apply it."

In *Texas & New Orleans R. Co.* v. *Dairyland Transp. Corp., supra:*

> "It would, however, be unrealistic for us to hold that, by not explaining the legal effect of an extra-hazardous crossing, the charge was rendered harmless. To the contrary, that omission was an added error which left free to determine such legal effect for itself."

In *Conn* v. *Young, supra*, the Second Circuit stated:

> "The instructions, however, are confusing, unduly complicated and heavily weighted in plaintiff's favor. In some instances where proper and necessary instructions are given in the form submitted by defendant they are inserted out of context and so enmeshed in irrelevant verbiage as not to be intelligible to the jury. The instructions were so erroneous in several respects and so prejudicial to defendant as to require a new trial."

In *Molhar* v. *Slattery Contracting Co, Inc., supra*,

> "The charge, while excellent in some respects, failed to clearly and adequately set forth the applicable principles of law. Where a charge is inadequate or of so confusing a character as to preclude fair consideration by the jury a judgment will be reversed and a new trial ordered."

In *Herbst* v. *Balogh, supra*:

> "When the charge is not clear and fails to adequately convey to the jury plaintiff's claim, a new trial is required in the interest of justice."

The issues were not properly submitted for the jury for determination necessitating the reversal of the judgment herein.

POINT V

The submission of the three question verdict after the argument and before the charge of the Court to the jury is contrary to Rule 51 of the Federal Rules of Civil Procedure.

Rule 51 provides:

> "The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury."

At the conclusion of the trial, the trial Court advised counsel that he would submit a special verdict of seven question covering the issues of liability and damages.

Relying upon this statement of the Court counsel for plaintiff presented his arguments to the jury. Counsel for defendant did likewise.

After the conclusion of the arguments and without any notice whatsoever the Court determined upon the three question verdict.

Rule 51 provides that counsel must be advised in advance of the guiding principles under which argument to the jury must be made.

In *Clegg* v. *Hardware Mutual Casualty Company*, 264 Fed. 2d 152, 157 (5 C. C. A.):

> "It is required to enable counsel intelligently to prepare requested charges, determine all of the issues which must be submitted, and then to plan an effective argument whose objective is to translate persuasion into specific decisive action by the jury."

To the same effect:

Dallas Ry & Terminal Co. v. *Sullivan*, 108 Fed. 2d 581, 5 C. C. A.

In this case counsel were misled by the trial Court. They were told what the special questions were to be; they argued the case to the jury and after all arguments were completed they were confronted with the special verdict which the court insisted in submitting to the jury over the objections of counsel for plaintiff.

Such conduct prevents the fair, impartial and orderly conduct of a trial and must not be permitted.

Such erroneous conduct is fundamental, obvious and injuriously prejudicial to the plaintiff herein.

Gibson v. *Lockheed Aircraft Service Inc., supra; United States* v. *Atkinson, supra*, and cases already cited in brief.

For this error this judgment must be reversed.

POINT VI

There are questions involving the construction of Rules 49 and 51 of the Federal Rules of Civil Procedure upon which the Courts of Appeal have expressed differing views which should be resolved by this Court.

The proper construction of Rules 49 and 51 of the Federal Rules of Civil Procedure are necessarily involved in this case.

The various Courts of Appeal have expressed differing views on these issues.

Such conflicts of opinion should be resolved by this Court and a writ of certiorari granted herein for this reason.

Mitchell v. *Trawler Racer, Inc.*, 80 S. Ct. 926.

RULE 49

Rule 49 of the Federal Rules of Civil Procedure provides in part:

> ***"Special Verdicts.*** **The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact."**

After completion of the evidence the trial Court advised counsel that he would submit a special verdict of seven questions.

After all arguments of counsel, the trial Court advised counsel it would submit the three questions which related to the issue of liability.

Counsel for plaintiff objected to the three questions but consented to one as to whether the visit of the plaintiff on the ship was inimical to the legitimate interests of the shipowner.

There was no attempt to submit a general verdict with special interrogatories as permitted by section b of Rule 49.

The Court below determined that questions 1 and 2 were not prejudicial and that counsel for plaintiff had waived the right to require the presentation of all issues by special interrogatories

The mere submission of the three questions was wholly contrary to the decision of this Court in *Miner v. Atlass*, 80 S. Ct. 1300.

(a) The proposed piecemeal verdict was properly excepted to and is contrary to the accepted practice of this Court and of other Circuit Courts.

The law is well settled that there can be no piecemeal submission of litigation.

> *Magenau* v. *Aetna Freight Lines Inc., supra;*
> *Ward* v. *Atlantic Coast Line R. Co. supra;*
> *Baker* v. *Texas & Pacific R. Co., supra;*
> *Hodges* v. *Easton, supra;*

Miller v. *American Bonding Company*, 257 U. S. 304, 308;

McKeon v. *Central Stamping Company*, 264 Fed. 385, 391, 3 C. C. A.;

Beacon Theatres Inc. v. *Westover*, 359 U. S. 500, 79 S. Ct. 948.

The submission of the three questions after argument was particularly prejudicial and contrary to the decisions of other Circuit Courts.

This precise issue has been presented and condemned in these cases.

Clegg v. *Hardware Mutual Casualty Company*, 264 Fed. 2d 152, 157, 5 C. C. A.;

Dallas Ry. & Terminal Company v. *Sullivan*, 108 Fed. 2d 581, 5 C. C. A.

(b) The prejudicial attempt to entrap and confuse the jury has been condemned in other decisions.

Blankenship v. *Ellerman's Wilson Line New York*, 265 Fed. 2d 455, 4 C. C. A.;

Magenau v. *Aetna Freight Lines Inc.*, 360 U. S. 273, 279, 79 S. Ct. 1184.

See other decisions of state courts cited at page 27 of this petition.

The prejudicial attempt to confuse and entrap a jury by improper instructions has likewise been condemned.

There are many cases affirming this conclusion.

Kendrick v. *Piper Aircraft Corp.*, 265 Fed. 2d 283, 290, 3 C. C. A.;

Texas & New Orleans R. Co. v. *Dairyland Transport Corp.*, 266 Fed. 2d 283, 290, 5 C. C. A.;

Louisville & N.R. Co. v. *Johnson*, 81 Fed. 679, 691, 7 C. C. A.;

and other cases cited at page 35 of this petition.

RULE 51

(a) The determination by the Court below that it would not consider the erroneous charge of the Trial Court because no proper exception was taken is contrary to the decisions of this Court and other Circuit Courts.

See:

Hormel v. *Helvering*, 312 U. S. 552, 556;
United States v. *Atkinson*, 297 U. S. 157, 160;
Dowell Inc. v. *Jowers*, 166 Fed. 2d 214; 5 C. C. A.;
McNello v. *John B. Kelly Inc.*, 283 Fed. 2d 96, 102, 3 C. C. A.;
Callwood v. *Callwood*, 233 Fed. 2d 784, 788, 3 C. C. A.;
Montgomery v. *Virginia Stage Lines Inc.*, 191 Fed. 2d 770, 774, U. S. Appeals D. C.;
Shokuwan Shimabukuro v. *Higeyoshi Nagayama*, 140 Fed. 2d 13, U. S. Appeals D. C.

Precise exception is not necessary as long as the Trial Court has been advised as to the contention of the litigant.

Many cases sustain this contention.

Broderick v. *Harvey*, 252 Fed. 2d 274, 1 C. C. A.;
Greyhound Corporation v. *Blakley*, 262 Fed. 2d 401, 9 C. C. A.;
Pierro v. *Carnegie-Illinois Steel Corp.*, 186 Fed. 2d 75, 3 C. C. A.;
Green v. *Reading Company*, 183 Fed. 2d 716, 3 C. C. A.;
American Alliance Insurance Company v. *Keleket X-Ray Corp.*, 248 Fed. 2d 920, 6 C. C. A.;
Elgin Corp. v. *Atlas Bldg. Products Inc.*, 251 Fed. 2d 7, 10 C. C. A., cert. denied 78 S. Ct. 1371.

One exception is sufficient.

Moreau v. *Pennsylvania R.R. Co.*, 166 Fed. 2d 543, 3 C. C. A.;
Union Pacific R. Co. v. *Owens*, 142 Fed. 2d 145, 9 C. C. A.;
U. S. v. *Rayno*, 136 Fed. 2d 376, 1 C. C. A. cert. den. 320 U. S. 776.

(b) The determination of the Court below that plaintiff could not raise the conceded and undenied exception taken by plaintiff to the instruction given by Court after the jury had sent the written request for clarification of the term "inimical" as shown by the record is contrary to all prior decisions.

See Point III of this Petition and cases there cited including decisions of this Court and various Circuit Courts.

(c) The determination of the Court below that it was not necessary to pass upon the liability created by the "change of status" is contrary to the applicable law.

See:

Ward v. *Atlantic Coast Line R. Co.*, 80 S. Ct. 789;
Magenau v. *Aetna Freight Lines Inc.*, *supra*;
Baker v. *Texas & Pacific Ry. Co.*, *supra*;
Kendrick v. *Piper Aircraft Corp.*, 265 Fed. 2d 482, 486, 3 C. C. A.;
Texas and New Orleans R. Co. v. *Dairyland Trans. Corp.*, 266 Fed. 2d 283, 290, 5 C. C. A.;

and other cases cited in Point IV of this petition.

(d) The determination of the Court below that it was not necessary to tell counsel before argument as to the exact questions which were to be submitted in the ultimate special verdict is contrary to applicable law.

See:

Clegg v. *Hardware Mutual Casualty Company*, 264 Fed. 2d 152, 157, 5 C. C. A.;
Dallas Ry. & Terminal Co. v. *Sullivan*, 108 Fed. 2d 581, 5 C. C. A.

These differing views of this Court and other Circuit Courts as to the construction to be placed upon Rules 49 and 51 of the Federal Rules of Civil Procedure necessitate their review by this Court.

Mitchell v. *Trawler Racer Inc.*, 80 S. Ct. 926.

POINT VII

Petitioner has been denied the trial by jury guaranteed to him by the Seventh Amendment of the Constitution of the United States.

The decisions of this Court have enforced the rights of all parties guaranteed by the Seventh Amendment.

It is elementary that a reversal of a judgment must be granted, where, as here there has been an obvious miscarriage of justice. *Gibson* v. *Lockheed Aircraft Service*, *supra*.

Throughout the trial counsel for plaintiff based his right of recovery herein under the rules of law enunciated by this Court in *Kermarec* v. *Compagnie General Transatlantique*, *supra*.

It was his contention in the first instance, all throughout the trial and now, that the same legal status given Kermarec in his case should be given this plaintiff whether it was his at the time he initially boarded the barge or whether his entry, which might have been unjustifiable, had been changed to that of an invited guest by reason of what had occurred on the boat.

In any event plaintiff was and still is entitled to a determination of his rights.

It was denied by the Trial Court.

Such determination was evaded by the Court below on grounds that are untenable and wholly erroneous.

Plaintiff's rights herein cannot be defeated

1. by any finding of a jury that he was not invited on the barge;

2. by any erroneous finding of the jury that the Captain had and could have no authority other than that given him by its owners;

3. by any erroneous finding that his visit must be "inimical" because it was "inconsistent with" the interests of its owners.

Plaintiff has been and is entitled to a fair and impartial determination by a jury as to whether

1. there was a change in his legal status after he came aboard the barge;

2. he was entitled to the protection of the same legal rights given Kermarec by this Court in his case; and

3. his visit on the barge was in fact and in law "inimical" to the legitimate interests of the owners of the barge.

From the beginning of the trial to the very end the Trial Court was prejudiced against him. He was considered as a legal outcast entitled to no legal protection from any source.

It was the opinion of the Court as he told counsel at the trial that the plaintiff

> "stealthily got aboard this barge with a view to committing larceny in the cabin of the captain and apparently he succeeded in part because he was not discovered until the captain of the barge went in there after he completed some of his chores on the deck." (App. 22a)

This attitude of the Trial Court is reflected throughout the record of the trial.

This attitude is confirmed by the indisputable fact that plaintiff was never permitted to have his contentions submitted for the determination of the jury.

This is confirmed by the obvious continuance of such prejudicial mistreatment from the beginning to the end of the trial.

The Court below has erroneously determined that plaintiff had waived his right to a fair trial, to a full, fair and unprejudiced presentation of the facts before a jury.

The record speaks for itself.

The cases cited confirm the contentions of counsel herein.

The protection of the Seventh Amendment should be granted to the plaintiff by the reversal of the judgment and an opportunity to have his rights determined.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be granted.

JACOB RASSNER and
LOUIS J. OPAL,
Attorneys for Petitioner.

THOMAS F. FRAWLEY,
BENJAMIN SCHWARTZ,
on the Brief.

APPENDIX

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—o—

No. 13—October Term, 1960.

(Argued September 28, 1960

Decided November 21, 1960.)

Docket No. 26145

JOACHIM RIBEIRO,

Plaintiff-Appellant,

v.

UNITED FRUIT COMPANY, a New Jersey Corporation, and ESSO STANDARD OIL COMPANY, a Delaware Corporation,

Defendants-Appellee,

and

UNITED FRUIT COMPANY, a New Jersey Corporation,

Third-Party Plaintiff-Appellee,

v.

ESSO STANDARD OIL COMPANY, a Delaware Corporation,

Third-Party Defendant-Appellee.

—o—

Before:

LUMBARD, *Chief Judge*,
TUTTLE* and FRIENDLY, *Circuit Judges*.

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*Of the Fifth Circuit, sitting by designation.

Appeal by plaintiff in admiralty personal injury suit from judgment following jury's answers to special interrogatories in favor of defendant. Judgment affirmed.

LOUIS J. OPAL (Jacob Rassner, Thomas F. Frawley, Benjamin Schwartz, on the brief), *for Plaintiff-Appellant.*

HAMPTON & MAHONEY, 76 William Street, New York 38, N. Y., *for United Fruit Co., Defendant-Appellee.*

KIRLIN CAMPBELL & KEATING (Walter X. Connor, James P. O'Neill, on the brief), 120 Broadway, New York 5, N. Y., *for Esso Standard Oil Co., Defendant-Appellee.*

TUTTLE, *Circuit Judge*:

Appellant appeals from a judgment in favor of the defendant, Esso Standard Oil Company, based on adverse answers by the jury to special interrogatories in this personal injury admiralty case. The jury, in answering the questions as it did, was authorized to believe the following facts:

The plaintiff was a night watchman on the S.S. PARISMINIA; defendant's barge No. 23 was tied up alongside this vessel to bunker it. Its crew consisted of two men designated by Esso as "captain" and "mate." The bargemen, in order to prepare for the fueling operation, placed a ladder on the deck of the barge leading to the deck of the ship. The bargemen prepared the vessel for the pumping of the fuel and returned to the barge.

Plaintiff had no duties on board the barge. Upon his return to the barge the captain entered a housing at the

stern which he used as his office and which also contained a small kitchen. When he entered he found the plaintiff inside drinking milk from a container which he had taken from the barge's refrigerator. When the captain asked the plaintiff what he was doing on the barge the latter replied that he wanted some coffee. The captain replied that he could have a cup of coffee, but plaintiff said he wanted a package of coffee. The captain replied that he had no coffee to give him. However, he permitted the plaintiff to finish the milk, after which he left. Shortly thereafter a noise was heard on deck and the plaintiff was found lying on the deck of the barge near the ladder. He was assisted by the bargeman to a chair, and, after about five minutes, ascended the ladder to his own ship without assistance. Plaintiff's claim is that the ladder had fallen with him. The captain and mate testified that the ladder did not fall.

Plaintiff's principal ground of reversal is his contention that the trial court erred in submitting only three special interrogatories to the jury. The questions put to the jury, and answered by it, were:

> "Did the captain of the Esso Barge 23 invite the plaintiff aboard the barge?
>
> The answer is 'No.'
>
> Did the captain have authority to invite the plaintiff aboard the barge for a purpose other than one in furtherance of the interests of the owner?
>
> The answer is 'No.'
>
> Was the plaintiff aboard the barge for a purpose inimical to the legitimate interest of her owner?
>
> The answer is 'Yes.'"

Plaintiff avers that Rule 49, Federal Rules of Civil Procedure, provides that special interrogatories "can only accompany a general verdict," citing the following excerpt from Rule 49(b):

> "The court may submit to the jury together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict."

Being met with appellee's citation of Section 49(a), "The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact," appellant, in his reply brief, challenges the correctness of the trial judge's application of this rule by asserting that the three questions did not present "each issue of fact." The defendant counters that the plaintiff "consented that the jury first be asked to determine plaintiff's status on the barge" and then points to the further provision of Section 49(a), which provides:

> "If in so doing [submission of written questions] the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury."

Defendant points to the fact that, although plaintiff's counsel did object to certin parts of the charge, he did not request the submission of additional fact issues to the jury. There can be no doubt that a party can waive his right to require the presentation of all issues by special interrogatory. See *Merrill* v. *Beaute Vues Corporation*, 10 Cir., 235 F. 2d 893.

We think it appropriate here to comment on the very substantial failure by both parties to support several of their contentions, especially as relates to waiver of the submission on special interrogatories, by incorporating in

their appendices so much of the trial proceedings as was necessary to support their respective assertions. The appellant did not include in his appendix any of the discussion between court and counsel touching on the submission of the question of liability separately from the issue of damages, and on the submission of special questions without a general verdict. The appellee not only failed to furnish the court with this part of the minutes, *but it failed to file any appendix whatever.* As to such a failure to comply with the rules of this court we have recently said:

> "Rule 15(b), adopted in an effort to save parties the expense of printing immaterial parts of long records, demands a good faith effort by counsel to reproduce those parts that are material; and the court is always willing to entertain applications under Rule 15(a) to present even these in typewritten form where printing would be burdensome." *United States* v. *Lefkowitz, et al.*, 2 Cir.,—F. 2d—.

The failure of the parties to file appendices containing all of the transcript necessary to support the contentions of their proponent, and particularly the complete failure of appellee to furnish any appendix whatever, has made it necessary for the Court to comb through the entire stenographic transcript in order to resolve the conflicting statements in the briefs.

The inspection we have made clearly demonstrates that appellant did not object to dividing the jury issue into two parts, nor did he object to dividing the issue of liability into two parts: (1) the status of the plaintiff on board, and (2) the question of negligence if the answer to the status question did not resolve the case. The trial court made it clear before giving his charge to the jury that he would follow this procedure, and counsel acquiesced, as he did to the submission of the special interrogatories

without a general verdict.[1] Furthermore, after the charge was given to the jury, appellant made no objection to the form of the submission.

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[1] After the trial court announced his intention of submitting the question of liability first, and then submitting the issue of damages only if liability was established, the following colloquy took place:

"Gentlemen, do you understand what the questions are that we are going to put to them

Mr. Rassner: I do, your Honor.

The Court: it won't be necessarily in that language, but that is going to be the substance of it.

Mr. Rassner: May I make a comment as to that, your Honor.

The Court: Yes, sir.

Mr. Rassner: In the main I feel that your Honor's thoughts should facilitate matters. However, as a matter of protecting my client's rights I would like to express one objection. I feel that the question of whether or not the plaintiff was aboard that vessel lawfully, rightfully is a matter of law and not a matter of fact, and therefore I object to so much—I consent to everything else but object to so much—

* * *

Mr. Rassner: I object to the submission of whether or not the plaintiff was lawfully or properly aboard the vessel to the jury on two grounds: first, that I believe it was error for the Court to permit any evidence as to the rules and regulations of the company as not binding on the plaintiff and in no wise lessening the authority of the master to invite or permit the plaintiff aboard the vessel, and I use the words 'invite or permit' advisedly; secondly, that whether or not the plaintiff was there with the original express invitation of the master or with his consent is immaterial so long as he was there for purposes not inimical to the interests of the owners of the barge 23.

With that one reservation—

* * *

Mr. Rassner: For the record, I would like to make my position clear.

The Court: I don't know what it means, 'for the record.' In other words, you don't mean it seriously?

Mr. Rassner: No. I object to a question being submitted to the jury which in any wise gives them the duty or right to pass upon whether or not the plaintiff was aboard the vessel rightfully or wrongfully other than in a manner inimical to the interests of the barge 23."

On the other hand, it is equally clear that plaintiff did not waive his objections to the submission of the first two questions as not being relevant.[2] He expressly, however, agreed to the submission of the third question, subject to his contention that the jury should be instructed to answer that question in his favor.

Plaintiff adhered to the position that it was unimportant, in an action brought under admiralty rules, whether the plaintiff had been invited on the barge or whether, if so invited, the master was exceeding his authority, because he insisted, and here urges, that the recent Supreme Court decision of *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, makes these questions irrelevant. The Court stated the question there to be:

> "The decisive issue is thus whether admiralty recognizes the same distinctions between an invitee and a licensee as does the common law."

It then answered the question by saying:

> "For the admiralty law at this late date to import such conceptual distinctions would be foreign to its traditions of simplicity and practicality. The Lottawanna, 21 Wall. 558, at 575. The incorporation of such concepts appears particularly unwarranted when it is remembered that they originated under a legal system in which status depended almost entirely upon the nature of the individual's estate with respect to real property, a legal system in that respect entirely alien to the law of the sea.[9] We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his

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[2] Plaintiff objected to the submission of the first question on the ground that it was immaterial whether he was an invitee or a licensee or even a trespasser. The only test was whether he was on board for purposes "inimical to the ship's interest." He objected to the submission of the second question on the ground that even if the issue of invitation was relevant, it would be the apparent authority of the captain to invite him and not the actual intercompany limitations on the captain's authority that would control.

legitimate interests the duty of exercising reasonable care under the circumstances of each case.[10] * * * *" (Footnotes in the opinion not here reproduced.) 358 U. S. 625, 632.[3]

We think we need not determine whether the submission of special interrogatory No. 1 actually presented a necessary factual issue as contemplated under Rule 49(b), *supra*. The plaintiff's status as an invitee or as a licensee on the barge may be a "circumstance" within the meaning of the Supreme Court's opinion quoted above. If so, it may be argued that it was necessary for the jury to resolve this issue before it could determine what would be reasonable care in such circumstances. However, since none of the three questions was in the alternative and they were not mutually dependent, and since the third question, agreed to be proper, presented the critical issue, we conclude that the submission of the first two questions, even if they did not present necessary issues, did not prejudice appellant. The jury expressly found, in answer to question No. 3, that he was "aboard the barge for a purpose inimical to the legitimate interest of her owner." This finding precludes a recovery on the ground of negligence. There was no basis for a finding that this defendant had violated any duty which he owed to this plaintiff as a trespasser. See 2 Harper and James, The Law of Torts, § 27.6, pp. 1461-67.

There is, of course, a further reason why the submission of the second question could not possibly harm the plaintiff. The jury expressly found that the captain did not invite the plaintiff. It, therefore, is immaterial that the jury was also asked to find whether the captain had actual authority to do so.

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[3] The term "all who are on board" was not used by the Supreme Court to include those as to whom the law gives extra protection, such as seamen and others aboard "doing a seaman's work and incurring a seaman's hazards." *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 99. See footnote 9 in *Kermarec* v. *Compagnie Generale Transatlantique*, *supra*.

In light of the consent by the plaintiff that this type of verdict might be asked, and in light of the fact that the first two questions did not complicate or bear in any way on the ability of the jury to answer the third one, we find that no prejudicial error resulted in the presenting of the three stated questions to the jury.

Plaintiff complains also about the court's admitting into evidence the written rules of the defendant touching upon the authority of the captain to invite visitors aboard the barge, and the admission of a written report of the mate. Since the jury found that the plaintiff was on the barge for purposes inimical to the interests of the ship, it is unimportant whether the captain was authorized under his company rule to invite him aboard. The admission of the rules could, therefore, not be prejudicial to the plaintiff. The written report of the mate was admissible under the principle recognized by this Court in *Gelbin* v. *New York, New Haven & Hartford R.R. Co.*, 2 Cir., 62 F. 2d 500. That case quoted from and approved the following statement from *DiCarlo* v. *United States*, 2 Cir., 6 F. 2d 364, 366:

> "It is well settled that, when the veracity of a witness is subject to challenge because of motive to fabricate, it is competent to put in evidence statements made by him consistent with what he says on the stand, made before the motive arose. The common sense of such a rule has been too strong for the formal objection that the evidence is hearsay, and indeed the objection is in substance not good anyway, since the witness is by hypothesis there to be cross-examined."

Finally, the plaintiff complains here that the court incorrectly charged the meaning of the word "inimical." After the jury had considered the case for some time they sent in a request for interpretation of the words "for purpose" and the word "inimical" as used in the third question. The question asked by the jury was, "In question 3 please clarify the use of the word 'inimical' and the phrase 'for purpose.'"

The court discussed the matter with counsel and plaintiff's counsel said: "May I respectfully ask the court to charge the jury only by answering the question directly without elaboration. They ask: what is the meaning of it? The meaning is hostile or harmful and nothing more." Previously, in the original charge, the court had said:

> "If you find the plaintiff went there for the purpose of helping himself to some food, whether it be milk or coffee or whatever it was, and that he did so without the captain's consent, you may find that he went there with a purpose inimical to the interest of the captain. In view of the relationship between the captain of the barge and its owner you may conclude from this testimony that the plaintiff had a purpose inimical to the legitimate interests of the owner of the barge."

This instruction was not objected to by the plaintiff.

In answer to its request for clarification the court told the jury:

> "It is very significant that your request is not for dictionary definitions of those words, but to clarify the use of those words. You know, a word used in one context may have one meaning and the same word used in a different context may have an entirely different meaning. As used in the context of the charge the term 'inimical' was intended to mean 'inconsistent with,' and the phrase 'for purpose' speaks for itself."

We think that the failure of the plaintiff to object to the instruction originally given and which the jury was still permitted to accept as correct even after the charge defining inimical as "inconsistent with," prevents the recharge from being error if in fact the court defined inimical too favorably for defendant, which we do not decide.

The judgment is AFFIRMED.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-first day of November, one thousand nine hundred and sixty.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

" ELBERT P. TUTTLE,
" HENRY J. FRIENDLY,
Circuit Judges.

JOACHIM RIBEIRO,
Plaintiff-Appellant,

—v.—

UNITED FRUIT COMPANY, a New Jersey Corporation and ESSO STANDARD OIL COMPANY, a Delaware Corporation,
Defendants-Appellees,

UNITED FRUIT COMPANY, a New Jersey Corporation,
Third-Party Plaintiff,

—v.—

ESSO STANDARD OIL COMPANY, a Delaware Corporation,
Third-Party Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro,
Clerk.